8

Office - Supreme Court, U.S.
FILED
NOV 28 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 468

LAURA K. ERNST,

Petitioner,

vs.

JEWEL TEA CO., INC., D/B/A JEWEL FOOD STORES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THOMAS D. NASH,
JOHN J. KENNELLY,
PHILIP J. CAREY,
JOSEPH B. QUINN,
111 W. Washington Street,
Chicago, Illinois,
Attorneys for Petitioner,

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Specification of Errors to Be Urged	6
Reasons for Granting the Writ	7
Conclusion	11

CITATIONS.

CASES:

Hovey v. Elliott, 167 U. S. 409	7
Farris v. Interstate Circuit, Inc., 116 F. 2d 409, 411	8
65 C. J. S., 523, 529	8
Tennant v. Peoria, etc., 321 U. S. 29	11
Wickstrom v. Ringling Bros., 313 Ill. App. 640	8

STATUTE:

Rule 52(a), Rules of Civil Procedure 6, 7, 8, 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No.

LAURA K. ERNST,

Petitioner,

vs.

JEWEL TEA CO., INC., D/B/A JEWEL FOOD STORES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on July 14, 1952. A petition for rehearing was denied on August 28, 1952.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals, Seventh Circuit, reversing the District Court, is reported in 197 F. 2d 881. The Findings and judgment of the District Court of the United States for the Northern District of Illinois are not reported, but will be found in the Record, pages 253-256 and are set forth herein under Statement.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on July 14, 1952; rehearing denied August 28, 1952. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925.

QUESTION PRESENTED.

Did the Court below (the Seventh Circuit) have the authority to disregard Rule 52 (a) to set aside the Findings of Fact by the District Court, without finding they were clearly erroneous, and without having any regard for the District Court's estimate of the credibility of the witnesses.

STATEMENT.

The District Court found the following facts and conclusions of law:

Findings of Fact (Tr. 253).

1. Plaintiff is a resident and citizen of the State of Illinois. Defendant is a corporation organized under the laws of the State of New York and is a resident and citizen of that state. The amount in controversy, exclusive of interest and costs, exceeds $3,000. The defendant performs a large portion of its business in the State of Illinois, particularly in Chicago, Illinois. Its business consists of the operation and maintenance of retail food stores in Chicago and vicinity.

2. On, to wit, July 25, 1950, and for a considerable period prior to that date, defendant was the occupant and owner of a retail food store known as a Jewel Food Store, located at 2744 West 55th Street, Chicago, Illinois; and

the defendant on that date and long prior thereto exercised and retained the control, management and maintenance of said store and property.

3. Plaintiff, on, to wit, July 25, 1950, at or about 4:00 P.M., was lawfully upon said store premises as an invitee and customer of defendant.

4. Plaintiff was born February 6, 1873. As of July 25, 1950, she was approximately 77 years of age. Plaintiff on and prior to July 25, 1950, was in fairly good health, considering her age. Plaintiff was a person of slender build, slightly over 5 feet in height, and weighing somewhere in the neighborhood of 98 to 104 pounds.

5. On and prior to July 25, 1950, defendant maintained and controlled an electrically operated exit door in said store. Said door operated through the use of what are commonly known as electric eye beams. The door was not constructed for manual operation, but was motivated by some type of motive power brought into operation solely through electric eye beams. Said door was of heavy construction and weighed about 132 pounds. It was approximately 40 inches in width. While the plaintiff was in the process of leaving said store, through said door, said door came in contact with her and caused her to fall to the floor. At and before the time of said accident plaintiff was in the exercise of ordinary care for her own safety.

6. Said door faced outward in a southerly direction. Plaintiff had no notice or knowledge that an area existed at and toward the north of the threshold of said door while hesitating or standing at said area; and plaintiff a person of slender build, could be struck by said door while hesitating or standing at said area; and plaintiff was struck at said area by said door, and was caused to fall and to be injured.

7. Plaintiff, considering her age and lack of electrical or electronic knowledge or knowledge or notice of precisely how said door operated, was struck by said door, while in the exercise of that degree of ordinary care required of this particular plaintiff. Said door was opened and closed through the use of electric eye beams. It was so constructed as to be opened and closed by the interception of said beams. Plaintiff had no notice or knowledge, and none was given to her, of the time second interval in which she had to clear said beams or be struck by said door.

8. Plaintiff was a customer and invitee of defendant and was lawfully in and upon its premises and was lawfully where she had a right to be when said door came in contact with her and caused her to fall. Defendant held itself out as a retail food store and invited plaintiff upon its premises.

9. As a proximate result of said door coming in contact with plaintiff, and said fall, plaintiff suffered a comminuted fracture of her left hip, and plaintiff has been hospitalized continuously since July 25, 1950, and plaintiff has incurred a hospital bill of $5,295.35 and doctor bills of $1,000.00; and plaintiff has become crippled as a result of said accident and has required and will require a great deal of future hospitalization and medical attention, and plaintiff has suffered and will continue to suffer considerable pain as a result of said accident, all as a proximate result of the negligence of the defendant.

10. When plaintiff appeared in court in this cause, she appeared upon a stretcher, attended by a nurse and other attendants. It was obvious that plaintiff was suffering considerable pain; and in view of this fact, her apparent weakness and advanced age, it would have been

unwise to permit an extended cross-examination, in view of the very brief direct examination of the plaintiff. The court is convinced that the plaintiff told the truth in describing the accident and in stating that she was struck by the door while at the threshold of the door, and the court is convinced that the plaintiff, at and before said accident, was exercising ordinary care for her own safety and that she was injured due to the negligence of the defendant.

11. Defendant was directed by this court to produce a written report which the manager of the defendant's store repeatedly asserted on the witness stand under oath he had made out and sent in normal channels to the main office of the defendant. No adequate explanation was given for the failure of defendant to produce said statement at the trial, although directed by this court to do so. The court is convinced that the defendant did not act in good faith in this respect and did not make an adequate or reasonable explanation for its failure to produce said report, and the court is convinced that said report was made, and were it produced, it would contain evidence against the defendant. In making this finding, the court is not charging the particular trial attorneys, Albert M. Howard and his associate Edward Vorbeck, for the defendant with bad faith on their part, the Court finds that on the contrary said attorneys personally exercised the best of faith and that it was the defendant itself or its officers who did not adequately explain the failure to produce the said written report.

Conclusions of Law.

1. At and before the time of said accident, plaintiff was not guilty of contributory negligence, and exercised ordinary care for her own safety.

2. Defendant was guilty of negligence which proximately caused injuries to the plaintiff, of a serious and permanent nature.

3. Plaintiff was a customer and invitee of defendant, and was lawfully upon its premises. Defendant held itself out as a retail food store and invited plaintiff upon the premises and as to the plaintiff was required to exercise reasonable care so as to avoid an unsafe or dangerous condition of its exit door and apparatus, not only for average or normal persons, but for aged persons, including the plaintiff. Defendant did not perform its duty in that behalf as to the plaintiff, and plaintiff was injured as a result thereof.

4. The failure of the defendant to make any reasonable or adequate explanation for its refusal and failure to produce at the trial of this case the report which the manager of defendant's store repeatedly admitted he had made out immediately following the accident and forwarded to defendant has induced this court to presume as a matter of law that said report, if produced, would contain evidence harmful to the defendant, and contrary to its position at the trial.

5. The sum of $35,000 is a fair, just and reasonable amount which plaintiff is entitled to recover against defendant.

J. Sam Perry,
Judge.

SPECIFICATION OF ERROR.

The Court of Appeals erred by trying this, a simple negligence case *de novo,* by completely disregarding Rule 52(a), and by usurping the function of the District Court.

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

The judgment of the Court of Appeals is not merely violative of Rule 52(a); it denies the plaintiff due process of law.

The judicial, as well as the legislative, power of the Federal Government is limited by the Fifth Amendment (*Hovey* v. *Elliott,* 167 U. S. 409).

Decisions of this Court have established that in a variety of circumstances similar to those presented by the instant case, a citizen will be granted relief where the Court below so departed from the accepted and usual course of judicial procedure, as to call for the exercise of this Court's supervision.

This was an ordinary and routine personal injury case, tried without a jury because of the ill and weak condition of the plaintiff, who could not undergo a jury trial.

A trial judge of the district court made clear and concise findings of fact and rendered judgment for the plaintiff.

The trial judge found that *this door* was so constructed that a blind spot existed at the threshold and that an aged and infirm slender person, such as the plaintiff, who hesitated at the threshold, would be struck by the door because she would not intercept a second beam which held the door open.

The undisputed testimony was that the electric doors of this defendant's stores were *not* erected or constructed the same as doors throughout the country (Tr. 199).

The Court of Appeals went beyond the limits of this case (the first case in this country tried *on the merits* as to the safety of an electric eye door as to aged and infirm

persons) and held that this door and electric doors are "safe and gentle"—this despite the fact that an 80-year old lady lies crippled and paralyzed because she was struck by the door while using it in a normal manner.

Nowhere in the opinion did the Court of Appeals even refer to Rule 52 (a). It is self evident that the Court of Appeals tried this case *de novo*.

Has the plaintiff no remedy? Is the disinclination of this Court to review cases reversed upon the facts to prevent the plaintiff from obtaining the only redress open to her—review by this Court?

The Court of Appeals decided this case entirely apart from the theory of the plaintiff at the trial, and from the findings of law and fact of the district judge. It unrealistically compared an electric eye door to a swinging or revolving door, and then fallaciously attempted to make an analogy under Illinois law. Plaintiff tried this case on *a structural defect theory,* which was proven beyond a reasonable doubt, not merely by a preponderance of the evidence. Even the defendant's trial attorney waived a motion for a finding for the defendant at the close of the plaintiff's case—and thus admitted the plaintiff made a *prima facie* case (Tr. 178).

It is well established law that whether a store operator fulfills his duty is one of fact; that a store operator should take into account that the aged and infirm, as well as the robust, may visit his store; that a store operator does not fulfill his duty by the installation of a standard or customary device; that the installation of a standard device does not establish as safe in law that which is dangerous in fact. This is the law throughout the country, including Illinois (65 C.J.S., 523, 529; *Wickstrom* v. *Ringling Bros.,* 313 Ill. App. 640, 40 N. E. 2d 585; *Farris* v. *Interstate Circuit, Inc.,* 116 F. 2d 409, 411).

Plaintiff proved by expert testimony, which was corroborated on cross-examination by defendant's expert, that the door was erected in such a manner that *there was an unsafe and dangerous area at and near the threshold* at which an aged, slow moving person of slender build, such as plaintiff, who hesitated in that dangerous area, would be struck by the door, due to the closing of the door before the customer intercepted the diagonal or second beam (R. 93, 189). The trial court explicitly found that the doorway was not safe as to plaintiff. This finding is based upon the testimony of *both* plaintiff and defendant (Fdg. 6, R. 254).

Certainly a very elderly lady should not be expected to know (as the Court of Appeals expected her) how the door operated, or that when the door opened without any manual or perceptible effort on her part, she should be prepared to manually prevent the door from closing upon her, while hesitating at the threshold. The trial judge was very careful to limit his findings *to this particular case.* He did not find, as a matter of law, or upon the *res ipsa loquitur* doctrine, that all electric doors are unsafe, or that any person injured by an electric door may *ipso facto* recover.

On review, the Court of Appeals made no reference at all to Rule 52 (a), disbelieved that which the trial court believed, believed that which the trial court did not believe, took away from plaintiff her judgment for $35,000.00; and beyond that, went out of its way to hold that this door was safe and gentle; and the latter despite the fact that the *undisputed testimony* in this case was that the door could strike a person with such force that it could cause a fractured hip (R. 40, 41); and also despite the fact that the substance of plaintiff's testimony was that the door did strike her and did cause her to fall, in consequence of which she is today virtually paralyzed.

This is not merely a violation of Rule 52 (a). It is trial *de novo*. It is a denial of due process. As a matter of finality and reality, the opinion of the Court of Appeals deprived the plaintiff of a trial in this case in the only duly constituted forum wherein she could try it, namely, in the District Court of the United States. Because of the fiction of diversity, although the defendant carries on its business in Illinois, plaintiff was required to file her action in the federal court (otherwise, it would have been removed). There the plaintiff tried her case before a trial judge, who emphatically stated that he was convinced that the plaintiff told the truth when she said she was struck by the door. He stated that he did not believe the store manager's testimony that plaintiff was picked up on the sidewalk outside the store.

Beyond all of this, the defendant brazenly refused to produce a written report which the store manager testified he made out in longhand on the date of the occurrence and transmitted through normal channels to defendant. The trial court specifically stated he was convinced that there was concealment and contempt for the processes of the district court (Tr. 177).

The Court of Appeals passed over this important item of evidence, which of itself should have sustained the judgment for the plaintiff, under the rule that failure to produce a competent admission against interest entitles the court to presume that were the concealed document produced it would contain evidence favorable to plaintiff, and harmful to defendant.

CONCLUSION.

We are aware of the disinclination of the Court to review cases which turn upon the facts. But this case is a classic example of a complete disdain for Rule 52 (a). If Rule 52 (a) can be ignored to the extent that it was ignored in this case, then the rule may as well be abrogated. For plaintiffs have no redress in reality when their judgments are arbitrarily taken away from them on the facts by a court of appeals—without reference to Rule 52(a)—without even saying that the findings are erroneous, much less clearly erroneous.

This Court has taken cases such as this, not merely to see that justice was done in the particular case, but to light the way for a court of appeals which might be usurping the function of the jury or trial court by reversing judgments for injured persons (*Tennant* v. *Peoria, etc.*, 321 U.S. 29). The fact that this is not a FELA case, and that no Federal Statute is involved directly, should not oust the plaintiff from her right of review, because it is only due to the fiction of diversity that the plaintiff went into the federal court. The Court of Appeals arrived at a judgment contrary to the rule that where there is in the record any evidence at all which, standing alone and taken with all its intendments most favorable to the party resisting the motion, tends to prove the material elements of his case.

In *Tennant* v. *Peoria, etc. R. Co.*, 321 U.S. 34, this Court said:

> "It is not the function of a court to search the record for conflicting evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain

> inferences. The focal joint of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

We respectfully ask this Court to grant certiorari, or upon this petition to reverse the Court of Appeals and affirm the District Court.

Respectfully submitted,

THOMAS D. NASH,
JOHN J. KENNELLY,
PHILIP J. CAREY,
JOSEPH B. QUINN,
Attorney for Petitioner.

JOHN J. KENNELLY,
PHILIP J. CAREY,
JOSEPH B. QUINN,
Of Counsel.

9

Office - Supreme Court, U.S.
FILED
DEC 31 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 468

LAURA K. ERNST,

Petitioner,

vs.

JEWEL TEA CO., INC., D/B/A JEWEL FOOD STORES,

Respondent.

BRIEF OF JEWEL TEA CO., INC., IN OPPOSITION TO PETITION FOR CERTIORARI.

ALBERT M. HOWARD,
ALVIN G. HUBBARD,
One North La Salle Street,
Chicago 2, Illinois,
Attorneys for Respondent, Jewel Tea Co., Inc.

HUBBARD, HUBBARD & DORGAN,
One North La Salle Street,
Chicago 2, Illinois,
Of Counsel.

THE DARNELL-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Statement of Facts	1-9
Plaintiff's Fall	3-5
Expert Testimony	5-7
An Alleged Report	8-9
Propositions of Law and Citations	10-13
Summary of Argument	14-30

I.

The oral testimony is without conflict. The facts appear undisputed. This court may ignore the findings of the trial judge 14

II.

There is no proof that plaintiff's injury was caused by anything in defendant's premises. There was no defect on defendant's premises. Plaintiff was not injured on defendant's premises. Defendant is not liable 15-19

III.

If one assume that the door was defective and the defect contributed in some way to plaintiff's injury, plaintiff could not recover. Plaintiff to show that the defect had remained long enough for defendant to discover and remedy same 19-21

IV.

The testimony of plaintiff's expert and plaintiff's testimony show that if plaintiff was standing within the threshold and was hit by the door, plaintiff herself caused the injury 21-25

V.

A.

Edward Vorbeck had exclusive control of all defendant's records relating to plaintiff's injury. Albert M. Howard had charge of the preparation and trial of the case. The court adjudicated that the two agents through whom defendant corporation was acting, acted in the best of faith. It follows that defendant corporation acted in the best of faith.....26-27

B.

The court's finding that defendant corporation did not act in good faith is sustained by no evidence. The court cannot make a finding of bad faith without clear and convincing proof..... 28

C.

The supposed report was not admissible at defendant's instance. Failure to produce the supposed report would not raise any presumption against defendant..29-30
Conclusion 31

TABLE OF CASES.

Antibus v. W. T. Grant Co. (1938), 297 Ill. App. 363 at 364-5.....11, 19-20

Armstrong v. Warner Bros. Theatres, Inc. (1947), 161 Pa. Super. 385, 54 A. 2d 831.....12, 25

Arnolt Corporation v. Stansen Corp. (1951 7 Cir.), 189 F. 2d 5 at 9-10.....10, 14

Billstrom v. The Triple Tread Tire Co. (1931), 220 Ill. App. 550 at 553.....13, 26

Brunet v. S. S. Kresge Co. (1940 7 Cir.), 115 F. 2d 713.12, 23

Cartier v. Troy Lumber Co. (1891), 138 Ill. 533 at 537-9 .....13, 29

Clark v. Carson Pirie Scott & Co. (1950), 91 N. E. 452, 340 Ill. App. 260 at 263-5.....10, 16-17

Davis v. Williamsburg (1936), 266 Ky. 276, 98 S. W. 2d 881 .....12, 25

Deitz v. Belleville Co-op. Grain Co. (1933), 273 Ill. App. 164 at 167-8.....11, 20

Dire v. Balaban & Katz, Inc. (1926), 241 Ill. App. 199 at 203-5.....10, 17

Foster v. J. C. Penny Co. (1948), 336 Ill. App. 352; 83 N. E. 619 (Abst.).....11, 20

Hanson v. Eustace (1844), 43 U. S. 653 at 709.....13, 30

Hill v. Alexander (1944), 321 Ill. App. 406, 53 N. E. 2d 307 .....12, 24

Jones v. Kroger Grocery and Baking Co. (1933), 273 Ill. App. 183 at 185-6..... 11

McKennan v. Mickelberry (1909), 242 Ill. 117 at 134..13, 28

Murray v. Bedell Co., 256 Ill. App. 247.....12, 25

Nichelson v. Mandel Bros. (1944), 322 Ill. App. 691 (Abst.) 11, 20

Olson v. Whitthorne and Swan (1928), 203 Cal. 206, 263 P. 518.....12, 23-24

Orvis v. Higgins (1950 2 Cir.), 180 F. 2d 537 at 539...10, 14

Paley v. Dupont (1934 7 Cir.), 71 F. 2d 856 at 859....13, 28

Randall Dairy Co. v. Pevely Dairy Co. (1934), 274 Ill. App. 474.....13, 27

Rogina v. Midwest Flying Service Inc. (1945), 325 Ill. App. 588.....13, 27

Schmelzel v. Kroger Grocery and Baking Co. (1951), 342 Ill. App. 501 at 506; 96 N. E. 885.....11, 20

Schnert v. Schipper & Block (1915), 193 Ill. App. 202 at 209.....10, 17

Sheridan v. Great Atlantic and Pacific Tea Co. (1945), 353 Pa. 11, 44 A. 2d 280.....10, 17-18

Taylor v. Boston Store (1944), 321 Ill. App. 301 (Abst.) 11, 21

Watkins v. Taylor Furnishing Co. (1944), 224 N. C. 674, 31 S. E. 2d 917.....10, 18

TEXTWRITER.

20 Am. Jur., § 184, p. 191.....13, 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 468

LAURA K. ERNST,

Petitioner,

vs.

JEWEL TEA CO., INC., D/B/A JEWEL FOOD STORES,

Respondent.

BRIEF OF JEWEL TEA CO., INC., IN OPPOSITION TO PETITION FOR CERTIORARI.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

SUMMARY OF FACTS.

There is no conflict in the testimony. There is no evidence that defendant was negligent. There is no evidence that anything on defendant's premises caused plaintiff's injury. The admitted physical facts disprove the contention of plaintiff.

In mid-afternoon on July 25, 1950, plaintiff, Laura K. Ernst, a woman 77 years old (Tr. 141), was found lying on the sidewalk in front of defendant's store (Tr. 77)

with a broken hip. Defendant's store faces south at 2744 West 55th Street, Chicago. Plaintiff offered a photograph of it taken from the south and east, showing the entrance and the exit doors. (Plf's. Ex. 10, Tr. 209.) Defendant offered a photograph showing the doors from the inside. (Def's. Ex. 6, Tr. 219.)

An electric mechanism opens the west door for customers leaving. This mechanism is controlled by two electric eyes set in a vertical cylinder on the west wall inside four feet from the door. (Def's. Ex. 6, Tr. 219.) An electric light fixed in a post three feet high standing inside east of the exit door and thirty inches back from the front wall casts a beam on the lower eye. (Def's. Ex. 6, Tr. 219.) On the outside thirty-seven inches from the wall and east of the exit door stands a similar post. An electric light is fixed in the latter post so as to cast a beam through the door to the upper electric eye in the cylinder inside. A rail on the top on the outside post extends to the wall. A similar rail on the inside post extends to the wall. (Tr. 89.) (Plf's. Ex. 10, Tr. 209.) (Def's. Ex. 6, Tr. 219.) Both beams of light shine all day long. A person approaching the door from the inside will intercept the beam from the inside post shining on the lower eye in the cylinder. (Def's. Ex. 6.) The door will open. As he walks toward the door he will intercept the beam coming from the outside post. As long as either of the beams is intercepted the door will stay open. A person passing from the store outside intercepts the first beam which causes the door to open. Then he intercepts the second beam which holds the door open. (Tr. 90-91.)

This electric eye mechanism has been constantly in use since August, 1949. (Tr. 67.) It is made by Magic Eye Division of Stanley Works. The company's first installations were in 1930 and 1931. Early in 1951 the company had in operation twelve thousand installations with an

average of two doors each. (Tr. 181.) An early installation is in a Pennsylvania Railroad terminal. (Tr. 182.) Several recent installations are in veterans' hospitals. (Tr. 183.) On July 25, 1950, the exit door at 2744 West 55th was in perfect order. (Tr. 196.)

Plaintiff's Fall.

About 3:00 P. M. on July 25, 1950, Floyd Bickel, defendant's manager, was in the rear of the store. He was signalled to the front. "There was a lady fell on the sidewalk." She was east of the post shown on plaintiff's Exhibit 10. (Tr. 209.) She was lying a foot and a half or two feet out on the sidewalk. Mr. Bickel did not see plaintiff fall. (Tr. 76-77.) She was lying * * * on her left side and her head was to the east and her feet was to the west." (Tr. 78.) Mr. Bickel picked plaintiff up off the sidewalk, carried her inside the store. He afterwards took her home and called the doctor. (Tr. 82.) He could not find any witnesses to the accident. (Tr. 69.)

Seventeen hours after her removal from the sidewalk, plaintiff's physician at the hospital examined her. She had suffered a fracture in her left hip (Tr. 50), two inches from the socket (Tr. 23). The physician found a soreness and swelling of her left hip resulting from the fracture. She bore no other marks of injury, bruises or cuts. She did not have any black and blue marks on her head, shoulders or anywhere else. (Tr. 51.) The plaintiff testified:

Q. Did the door strike you?
A. The door struck me. (Tr. 158.)

On cross-examination:

Q. * * * Can you tell us, Mrs. Ernst, whereabouts in the door you were when the accident happened.
A. I was right in the door, in the middle of the door. I was right in the threshold. (Tr. 159-160.)

Q. Were you walking, moving, or were you standing still at the time of the accident?

A. I was standing. (Tr. 160.)

Q. • • • Mrs. Ernst, did you see any part of the door come in contact with you?

A. No, I don't think I did. (Tr. 161-162.)

Q. Did you feel anything come in contact or touch with your body, any part of your body or your person, before you fell?

A. No.

Q. You can't tell the court at this time whether the door came in contact with you at all before you fell, can you?

A. I don't believe I can.

The Court: "The question is objectionable, and the answer will be stricken if an answer was made." (No objection had been made.) (Tr. 162.)

Q. Mrs. Ernst, when you fell, do you know whether you fell, first of all, inside the store or outside the store?

A. That I don't remember.

Q. Do you remember falling, Mrs. Ernst?

A. Yes, I remember falling. (Tr. 163.)

Q. • • • You remember somebody coming over to you?

A. Yes.

Q. And lifting you up off the sidewalk?

A. Yes.

Q. And carried you inside the store.

A. Yes.

Q. Did he sit you on a seat inside the store?

A. Yes. (Tr. 163.)

Q. All right, Mrs. Ernst, you had been in the store on previous occasions, had you?

A. Yes.

Q. And had you gone out of the store through this same exit door in the previous times?

A. Oh, yes, many times, many times.

Q. And you had never had any difficulty in going out of that door before, had you?

A. No, no. (Tr. 164.)

Q. • • • On the day that you fell, did this door that you went out of operate any differently than it had on previous occasions when you had gone out of that same door?

A. No.

Q. Mrs. Ernst, can you tell the Judge now any place on your body or your person that anything came in contact with you before you fell?

A. No. (Tr. 165.)

There is no evidence that plaintiff was on defendant's premises when she fell.

There is no evidence that the door caused plaintiff to fall.

There is no evidence that plaintiff fell when the door hit her.

There is no evidence that the impact of the door injured plaintiff in any way.

There is no evidence that the door was defective or out of order.

Expert Testimony.

HARVEY PARDEE, an engineer called by plaintiff, testified: There are two spots where a person might stand and be struck by the door. (Tr. 91.) One of those spots was just within the threshold of the door. The other spot was on the outside. (Tr. 91.) He designated how one might be struck by the door at the threshold, saying:

> "I move toward the exit; when I reach this point at the threshold, just crossing the threshold, I have passed the first beam, but not as yet intercepted the second beam.
>
> "If then I, representing the customer, or whoever it may be, should hesitate at this point, the door would close. Then, when I start ahead, I would bump into the door, or the door would bump into me." (Tr. 101.)

On cross-examination he stated:

Q. As a matter of fact, they hit this diagonal beam as they go through the threshold?

A. Unless they happen to come to the edge of the door.

He further stated that it would have to be a slender person. (Tr. 108.)

Q. You say that a person passing through the threshold would not cut the beam if they were close to the door jamb on the east side?

A. Could be.

Q. From the time that you put your foot across on this beam to open the door, and the time that the door closed against the threshold, here, however slowly you walked, there must have been eight to nine seconds that elapsed?

A. *It did not quite close. It closed within about eight inches until it started to move slowly.* (Emphasis ours.)

Q. So that the door would have to be almost completely closed before it could come in contact with you.

A. No. I got my head through.

Q. You mean that you were standing on the threshold, and you reached your head out?

A. Yes, sir, leaned forward.

Q. Then the door at that point was moving very slowly?

A. No, it had not started to move slowly. It was just at the point of being snubbed. (Tr. 119.)

Q. And did you keep your head in that position so that the door came in contact with your neck or something like that?

A. Well, for a couple of seconds, I presume.

Q. And I assume if you kept your body the same way you stated, and the head the way you stated for a couple of seconds, you stopped the motion of the door, didn't you?

A. Yes. (Tr. 120.)

He testified the door operated properly (Tr. 122):

> Q. • • • the speed and the pressure on an ordinary door with a Corbin door check of the same size is the same as the closing of the electric eye door isn't it?
>
> A. Many times they are similar.
>
> Q. And when you are going out of an ordinary door of that size, without an electric eye, that is has a Corbin door check on it, you still would have to get out of the way of that door as it is closing otherwise you would be hit?
>
> A. One usually holds the door open until he passed through. (Tr. 123.)

Mr. Pardee testified the door in question is a regular store door that you see in a Jewel Tea or Kroger or any other chain store or five and ten cent store. It is the same size and everything else about, except for the power mechanism, the electric eye and the motor to move it. (Tr. 127.) He did not notice any unusual features in the appratus for opening and closing the door. (Tr. 128.)

On redirect examination the witness stated:

> Q. Now, it would take a high degree of coincidence for a person to be standing at exactly the spots where that door can strike them, is that right, even if a person does hesitate?
>
> A. I would say that it would take a very high degree of coincidence. It would be a coincidence. (Tr. 129.)

The witness testified he measured the pressure required to stop the motion of the door. When the door was beginning to close it required five pounds. (Tr. 115.) To stop the door from closing or to hold the door required between five to ten pounds pressure. There was no difference in the amount of force required to stop the door and the amount required to hold it. (Tr. 116.)

As to an Alleged Report.

Counsel caused a subpoena *duces tecum* to be served on Floyd Bickel, manager of defendant's store, to produce all records concerning the accident. (Tr. 211.)

FLOYD BICKEL testified:

He made a report of the occurrence. He sent it to the Jewel Tea office. (Tr. 74.) He did not see the accident. (Tr. 76.) He does not know how long the report was, possibly one page. (Tr. 79.) He made the report within a week. (Tr. 85.)

The court stated defendant should produce the report. (Tr. 75.)

EDWARD VORBECK testified:

He is and has been since prior to July 25, 1950, attorney for the food department and assistant secretary of Jewel Tea Company. (Tr. 171-172.) In his capacity as attorney he has charge of the company's records of accidents that happen in or about the stores. (Tr. 172.) He had received the subopena directed to Mr. Bickel. (Tr. 172 and 211.) He had examined the records submitted to plaintiff's counsel. The records produced constituted all the records of Jewel Tea Company in the *Laura Ernst* case. (Tr. 172-173.) He heard Mr. Bickel testify. He did not have the report testified by Mr. Bickel. (Tr. 174.) To his knowledge he never had had any such report. He produced all the documents in reference to the case he was able to find. (Tr. 174.) According to his recollection, he received a telephone call about Mrs. Ernst's injury. He promptly called someone else and asked them to investigate. (Tr. 174-175.) It was standing practice with their company that in case a more serious injury was involved the store manager was to call direct. An employee is required to re-

port an accident. He is not required to report it in writing. (Tr. 175.) He did not know whether such a report as testified by Mr. Bickel was made. He had no recollection of ever having received such a report in his division. (Tr. 175.) All records pertaining to customer accidents are kept in the files of the legal division. Upon receipt of a report it would go to his secretary's desk. Such report would be filed after entering it in one of the records that he had produced. In the notebook he had produced is the record of the accident in question. He did not ordinarily lose reports if he received them. He had made a thorough search for the report. (Tr. 177.)

As part of the court's finding that Jewel Tea Company did not exercise good faith the court also found:

> "* * * In making this finding, the court is not charging * * * Albert M. Howard and * * * Edward Vorbeck, * * * with bad faith on their part, the Court finds that on the contrary said attorneys personally exercised the best of faith * * *." (Tr. 255-6.)

PROPOSITIONS OF LAW.

I.

SINCE THE EVIDENCE IS WITHOUT CONFLICT, THE COURT OF APPEALS WAS JUSTIFIED IN MAKING IT OWN CONCLUSIONS.

Arnolt Corporation v. *Stansen Corp.* (1951, 7 Cir.), 189 F. 2d 5 at 9-10.

Orvis v. *Higgins* (1950, 2 Cir.), 180 F. 2d 537 at 539.

II.

IF ONE ASSUME (CONTRARY TO FACT) THAT PLAINTIFF WAS INJURED ON DEFENDANT'S PREMISES, DEFENDANT WOULD NOT BE LIABLE FOR PLAINTIFF'S INJURY IN THE ABSENCE OF A SHOWING THAT THE INJURY WAS CAUSED BY A DANGEROUS CONDITION OR DEFECT ON DEFENDANT'S PREMISES.

Clark v. *Carson, Pirie, Scott & Co.* (1950), 340 Ill. App. 260 at 263-5; 91 N. E. 619.

Sehnert v. *Schipper & Block* (1915), 193 Ill. App. 202 at 209. (Plaintiff struck swinging door—no recovery as a matter of law.)

Dire v. *Balaban & Katz, Inc.* (1926), 241 Ill. App. 199 at 203-5.

Sheridan v. *Great Atlantic and Pacific Tea Co.* (1945), 353 Pa. 11, 44 A. 2d 280.

Watkins v. *Taylor Furnishing Co.* (1944), 224 N. C. 674, 31 S. E. 2d 917. (Plaintiff struck by an electric eye door—no recovery as a matter of law.)

III.

IF ONE ASSUME (CONTRARY TO FACT) (1) THAT THE DOOR ON THE DAY IN QUESTION HAD BECOME DEFECTIVE, (2) THAT SUCH DEFECT CAUSED PLAINTIFF'S INJURY, (3) THAT THE PLAINTIFF WAS IN THE EXERCISE OF DUE CARE FOR HER OWN SAFETY, EVEN ON THESE THREE ASSUMPTIONS JEWEL TEA CO. WOULD NOT BE LIABLE. PLAINTIFF HAS FAILED TO SHOW THAT THE DEFENDANT KNEW OF SUCH SUPPOSED DEFECT OR THAT SUCH DEFECT HAD EXISTED SO LONG A TIME THAT DEFENDANT BY THE EXERCISE OF DUE CARE HAD AN OPPORTUNITY BOTH TO DISCOVER AND TO REMEDY THE DEFECT.

Antibus v. *W. T. Grant Co.* (1938), 297 Ill. App. 363 at 364-5.

Schmelzel v. *Kroger Grocery and Baking Co.* (1951), 342 Ill. App. 501 at 506; 96 N. E. 885.

Jones v. *Kroger Grocery and Baking Co.* (1933), 273 Ill. App. 183 at 185-6.

Deitz v. *Belleville Co-op. Grain Co.* (1933), 273 Ill. App. 164 at 167-8.

Foster v. *J. C. Penny Co.* (1948), 336 Ill App. 352. (Abstract.)

Nichelson v. *Mandel Bros.* (1944), 322 Ill. App. 691. (Abstract.)

Taylor v. *Boston Store* (1944), 321 Ill. App. 301. (Abstract.)

IV.

IF ONE ASSUME (CONTRARY TO FACT) (1) THAT THE DOOR WAS DEFECTIVE AT THE TIME IN QUESTION, (2) AND THAT SUCH DEFECT CAUSED PLAINTIFF'S INJURY, (3) AND THAT DEFENDANT KNEW OF SUCH DEFECT OR THAT SUCH DEFECT HAD EXISTED SO LONG THAT DEFENDANT IN THE EXERCISE OF DUE CARE HAD HAD A REASONABLE OPPORTUNITY TO DISCOVER AND REMEDY SAID DEFECT, STILL EVEN ON THESE THREE ASSUMPTIONS, PLAINTIFF CANNOT RECOVER IN THIS CASE. ACCORDING TO HER OWN TESTIMONY, PLAINTIFF IS GUILTY OF THE NEGLIGENCE WHICH CAUSED HER INJURY.

Brunet v. *S. S. Kresge Co.* (1940, 7 Cir.), 115 F. 2d 713.

Olson v. *Whitthorne and Swan* (1928), 203 Cal. 206, 263 P. 518.

Hill v. *Alexander* (1944), 321 Ill. App. 406, 53 N. E. 2d 307.

Murray v. *Bedell Co.*, 256 Ill. App. 247.

Davis v. *Williamsburg* (1936), 266 Ky. 276, 98 S. W. 2d 881.

Armstrong v. *Warner Bros. Theatres, Inc.* (1947), 161 Pa. Super. 385, 54 A. 2d 831.

V.

THE FINDING THAT JEWEL TEA COMPANY DID NOT ACT IN GOOD FAITH IS WITHOUT FOUNDATION.

A.

The Defendant Corporation Can Act Only Through Its Agents. Edward Vorbeck Had Charge of All Defendant's Records Relating to the Injury of the Plaintiff Albert M. Howard Had Charge of the Preparation and Trial of the Case From the Outset. The Finding of the Court That Edward Vorbeck and Albert M. Howard "Personally Exercised the Best of Faith" (Tr. 255-

256) Is Equivalent to a Finding That the Defendant Corporation "Had Exercised the Best of Faith."

Billstrom v. *The Triple Tread Tire Co.* (1931), 220 Ill. App. 550 at 553.

Rogina v. *Midwest Flying Service Inc.* (1945), 325 Ill. App. 588.

Randall Dairy Co. v. *Peveley Dairy Co.* (1934), 274 Ill. App. 474.

B.

The Finding of the Trial Judge That Jewel Tea Co. Did Not Exercise Good Faith in Not Producing an Alleged Report of Its Manager Is Erroneous as a Matter of Law. Edward Vorbeck Had Sole Charge of the Records as Agent of Defendant. He Testified He Had Made a Thorough Search for the Alleged Report. The Court Found His Testimony Was Given in "the Best of Faith." It Does Not Appear That the Alleged Report Contained Any Material Evidence. The Court Could Not Make a Finding of Bad Faith Against the Corporation Without Proof.

McKennan v. *Mickelberry* (1909), 242 Ill. 117, 134.

Paley v. *Dupont* (1934, 7 Cir.), 71 F. 2d 856 at 859.

C.

Since the Alleged Report Was Not Admissible at the Instance of Defendant, Supposed Failure to Produce the Supposed Report Does Not Raise Any Presumption Against Defendant. This Is Especially True Since It Contained No Material Evidence.

Carter v. *Troy Lumber Co.* (1891), 138 Ill. 533 at 537-9.

Hanson v. *Eustace* (1844), 43 U. S. 653 at 709.

20 Am. Jur., #184, p. 191.

ARGUMENT.

I.

SINCE THE EVIDENCE IS WITHOUT CONFLICT, THE COURT OF APPEALS WAS JUSTIFIED IN MAKING ITS OWN CONCLUSIONS.

The door was standard equipment in good condition. If plaintiff came in contact with the door while standing inside the threshold, such contact could not have caused her to fall outside on the sidewalk and east of the post. (Plf's. Ex. 10, Tr. 209.) She would have fallen inside the store. The physical facts show that plaintiff's case is without merit. Apart from this, there is no dispute in the testimony. Under these circumstances, the reviewing court may ignore the trial court's findings.

In *Arnolt Corp.* v. *Stansen Corp.*, 189 F. 2d 5, the court held:

> "Where a trial judge sits without a jury, the rule varies with the character of the evidence: * * * (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance." *Arnolt Corp* v. *Stansen Corp.* (1951 7 Cir.), 189 F. 2d 5 at 10.

A similar holding by the Second Circuit is in *Orvis* v. *Higgins*, 180 F. 2d 537 at 539. There is no conflict of testimony, no evaluation of credibility in this case.

II.

IF ONE ASSUME (CONTRARY TO FACT) THAT PLAINTIFF WAS INJURED ON DEFENDANT'S PREMISES, DEFENDANT WOULD NOT BE LIABLE FOR PLAINTIFF'S INJURY IN THE ABSENCE OF A SHOWING THAT PLAINTIFF'S INJURY WAS CAUSED BY A DANGEROUS CONDITION OR DEFECT ON DEFENDANT'S PREMISES.

In this case the evidence shows plaintiff was not on defendant's premises when she fell. The exit door did not cause plaintiff to fall. She had left defendant's store. She was out on the sidewalk. Collision with the door did not cause plaintiff to fall.

Plaintiff testified nothing hit her before she fell:

> "Q. Did you feel anything come in contact or touch with your body before you fell?
> "A. No." (Tr. 162.)

Plaintiff did not claim that she was inside defendant's store when she fell:

> "Q. Mrs. Ernst, when you fell, do you know whether you fell, first of all, inside the store or outside the store?
> "A. That I don't remember." (Tr. 163.)

Mr. Bickel, defendant's manager, testified:

> "There was a lady fell on the sidewalk." (Tr. 69.)
> "Q. When you got to the front, where was Mrs. Ernst?
> "A. She was laying on the walk outside." (Tr. 77.)
> "Q. • • • What do you mean by 'out on the sidewalk'? Out where?
> "A. I would say east, from that post outside." (Tr. 77.)

"East from the post" (Plf's. Ex. 10, Tr. 209), means plaintiff had passed out the door, walked the three and one third feet to the sidewalk from the door, turned east

on reaching the sidewalk and had walked beyond the post which is east of the exit passageway. Mr. Bickel's testimony stands undisputed.

Plaintiff testified she was out on the sidewalk when she was picked up. She testified she remembered falling. (Tr. 163.)

"Q. * * * You remember somebody coming over to you?
"A. Yes.
"Q. And lifting you up off the sidewalk?
"A. Yes.
"Q. And carried you inside the store?
"A. Yes." (Tr. 163.)

If Plaintiff had fallen when the door hit her, she would have fallen inside the store.

If the door had caused plaintiff to fall, defendant would not be liable for her injury. The defendant operator of a store owes a duty to its invitee to exercise due care to keep the premises reasonably safe for the invitee. The defendant is not an insurer. Defendant is not liable in the absence of a showing of negligence on its part. Defendant had standard equipment in perfect order. The fact that somebody was injured in or about the premises does not cast any liability on defendant. In the absence of a showing of a dangerous condition or defect in the premises the customer cannot recover.

In *Clark* v. *Carson Pirie Scott & Co.*, 340 Ill. App. 260, the plaintiff fell in the lobby of defendant's store. The lobby was slippery. There was a brass strip which protruded an eighth of an inch and had become worn and slippery. The lobby was slippery because it had been raining. Holding plaintiff could not recover as a matter of law, the court said:

"The condition described by the witnesses is one that is not only not unusual, but is customarily to be found

on such days as described in the testimony, in vestibules of this character and the sidewalks and the premises surrounding entrances to public places."

Clark v. *Carson Pirie Scott & Co.* (1950), 340 Ill. App. 260 at 265.

In *Schnert* v. *Schipper & Block,* 193 Ill. App. 202, the entrance to defendant's department store was through a twenty foot lobby. At each end defendant maintained a pair of swinging doors. Plaintiff, a customer, was about to pass through one of the outer doors. Someone passed through the inner doors with such force as to set the front double doors in motion. One of the front doors struck plaintiff on the thigh, knocking her down, as a result of which plaintiff became paralyzed and helpless. Reversing the judgment without remanding, the court said:

"We feel compelled to reverse the judgment solely on the ground that appellant is not shown guilty of any negligence contributing to the injury complained of."

Schnert v. *Schipper & Block* (1915), 193 Ill. App. 202 at 209.

The double doors were standard equipment. In this case defendant's exit was in perfect condition. The fact that the exit door was opened for customers by an electric eye mechanism did not constitute any defect or dangerous condition.

In *Dire* v. *Balaban and Katz, Inc.,* 241 Ill. App. 199, plaintiff was injured on a stairway in defendant's theater. The court found that plaintiff had not shown any defect in the stairway. Plaintiff could not recover as a matter of law.

In *Sheridan* v. *Great Atlantic and Pacific Tea Co.,* 353 Pa. 11, 44 A. 2d 280, plaintiff, a woman 76 years of age, was leaving defendant's grocery store through the front doorway. Each door was seven feet high and contained a

clear plate glass panel five feet by two feet. They were controlled by compressed air stops. Neither had exit or entrance signs. Plaintiff placed her packages on the floor in order to open the right hand door. As she was straightening up another customer entering pushed the door open knocking plaintiff down, breaking plaintiff's hip. The court held the defendant company was not liable as a matter of law.

In *Watkins* v. *Taylor Furnishing Co.*, 224 N. C. 674, 31 S. E. 2d 917, defendant maintained an electric eye door in its store building. The testimony showed that plaintiff attempted to pass through the door when it was partly open. The door suddenly closed. It caught plaintiff between the door and the frame and caused the injury. Holding that plaintiff could not recover as a matter of law, the court said:

> "There is a total lack of evidence of negligence in the erection, operation or maintenance of the 'magic eye' doors. There is no evidence that the doors involved in the occurrence under investigation ever suddenly closed before said occurrence, or ever before caught any one attempting to enter the store, notwithstanding the doors had been installed several months and thousands of customers had entered through the door openings. This want of evidence of negligence could only be supplied by assuming that the mere facts of the plaintiff's being caught by the sudden closing door and the injury consequent thereupon furnish such evidence. We could hardly go so far as to make such an assumption, since we are unable to see any evidence of negligence in the facts themselves."
>
> *Watkins* v. *Taylor Furnishing Co.*, 31 S. E. 2d 917 at 918.

The plaintiff in this case did not show that she was injured on Jewel Tea's premises. The evidence shows that plaintiff was on the sidewalk several feet out from the building line east of the post. The post was east of the

exit. Plaintiff was lying with her head to the east and her feet to the west. If plaintiff had been knocked down by the door while she was standing inside the threshold, it would have been impossible for her to be on the sidewalk east of the post. Plaintiff testified that she had been through the door many times. The door operated the same on this occasion as it had operated on prior occasions. The plaintiff has no cause of action against Jewel Tea Company. The only conclusion that can be drawn from the evi-evidence is: Plaintiff did not fall until she was on the side-walk. If the closing door had hit plaintiff while she was in the middle of the door—in the threshold—and caused her to fall she would have fallen inside the store.

III.

IF ONE ASSUME (CONTRARY TO FACT) (1) THAT THE DOOR ON THE DAY IN QUESTION HAD BECOME DEFECTIVE, (2) THAT SUCH DEFECT CAUSED PLAINTIFF'S INJURY, (3) THAT THE PLAINTIFF WAS IN THE EXERCISE OF DUE CARE FOR HER OWN SAFETY, EVEN ON THESE THREE ASSUMPTIONS JEWEL TEA CO. WOULD NOT BE LIABLE. PLAINTIFF HAS FAILED TO SHOW THAT THE DEFENDANT KNEW OF SUCH SUPPOSED DEFECT OR THAT SUCH DEFECT HAD EXISTED SO LONG A TIME THAT DEFENDANT BY THE EXERCISE OF DUE CARE HAD AN OPPORTUNITY BOTH TO DISCOVER AND TO REMEDY THE DEFECT.

In *Antibus* v. *W. T. Grant Co.*, 297 Ill. App. 363, plaintiff was ascending the basement stairs in defendant's store. On about the fifth or sixth step he stepped on a banana peeling and fell. Plaintiff was unable to show how long the banana peeling had been there. Because of his failure of proof in that regard the court held that he could not recover as a matter of law. The court said:

> "It is necessary to allege and prove that defendant knew of such unsafe condition, or that same existed for a period of time from which it might be inferred

that he, by exercising ordinary care, could have learned of same;"

Antibus v. *W. T. Grant Co.*, 297 Ill. App. 363 at 365.

If one assume the door had become defective at the time in question and such defect caused plaintiff's injury, the plaintiff could not recover from Jewel Tea Company in the absence of a showing that the defect had existed for a sufficient time in which defendant, in the exercise of reasonable care, could have discovered and remedied the same. Here there was no defect whatsoever.

In *Schmelzel* v. *Kroger Grocery & Baking Co.*, 342 Ill. App. 501, the plaintiff in defendant's grocery store stepped on a piece of lettuce and fell. There was no showing that the lettuce was put there by defendant's agents. There was no showing how long the lettuce had been there. Holding that plaintiff could not recover as a matter of law, the court said:

"It is necessary to allege and prove the defendant knew of such unsafe condition, or that same existed for a period of time from which it might be inferred that had be been exercising ordinary care he could have learned of same."

Schmelzel v. *Kroger Grocery & Baking Co.*, 342 Ill. App. 501 at 506.

In *Deitz* v. *Belleville Co-op. Grain Co.*, 273 Ill. App. 164, plaintiff, sixty-four years of age, was unsteady on his feet. He used a cane. His son drove him to defendant's yard provided for customers. On his way to defendant's doorway his right foot struck a piece of metal. He fell and broke his hip. Judgment for the plaintiff was reversed without remanding.

In each of the following cases: *Foster* v. *J. C. Penny Co.*, 336 Ill. App. 352; *Nichelson* v. *Mandel Bros.*, 322 Ill.

App. 691; *Taylor* v. *Boston Store,* 321 Ill. App. court held that the operator of a store is not liabl dangerous condition on the premises except that dition has existed long enough that the operat discover and remedy the defect.

The plaintiff Ernst does not claim there was a on defendant's premises. Pardee, plaintiff's ex ness, testified that a person might stand just i threshold so that no part of his body extended than fifteen inches from the door jamb and he st the door. He stated, however, that in order to with the door he had to lean forward because stopper snubbed the door when it was eight inc closing.

IV.

IF ONE ASSUME (CONTRARY TO FACT) (1) THAT WAS DEFECTIVE AT THE TIME IN QUESTION, (2) SUCH DEFECT CONTRIBUTED TO PLAINTIFF'S IN AND THAT DEFENDANT KNEW OF SUCH DEFECT SUCH DEFECT HAD EXISTED SO LONG THAT DEFE THE EXERCISE OF DUE CARE HAD HAD A RE OPPORTUNITY TO DISCOVER AND REMEDY SAI STILL EVEN ON THESE THREE ASSUMPTIONS, CANNOT RECOVER IN THIS CASE. ACCORDING TO TESTIMONY, PLAINTIFF IS GUILTY OF THE NE WHICH CAUSED HER INJURY.

Plaintiff testified she was standing in the mid door when it hit her. (Tr. 159.) She was stan (Tr. 160.) She was standing in the door lookin out towards the street. (Tr. 161.)

She had used the door many times.

"Q. And had you gone out of the stor this same exit door in the previous times? A. Oh, yes; many times, many times."

She further testified that on the day in question, the door did not operate any differently than on the prior occasions.

> "Q. * * * On the day that you fell, did this door that you went out of operate any differently than it had on previous occasions when you had gone out of that same door?
> A. No." (Tr. 165.)

Plaintiff expert Pardee testified:

(a) When the door was eight inches from closing, it was snubbed. It moved very slowing. (b) In order for the "slight person" to be hit while standing within the threshold he must (1) stand still or move very slowly, (2) stick his head forward more than eight inches.

Pardee's evidence shows that in order for one to be hit by the door while standing within the threshold where plaintiff was standing required both forethought and planning. He testified:

> "Q. From the time that you put your foot across on this beam to open the door, and the time that the door closed against the threshold, here, however slowly you walked, there must have been eight to nine seconds that elapsed?
> A. It did not quite close. It closed within about eight inches until it started to move slowly.
> Q. The way you have the door there now, it certainly is more than eight inches?
> A. No. Just enough to get my head through.
> Q. That is, were you standing on the threshold when you said the door came in contact with you?
> A. I believe so.
> Q. So that the door would have to be almost completely closed before it could come in contact with you.
> A. No. I got my head through.
> Q. You mean that you were standing on the threshold, and you reached your head out?
> A. Yes, sir, leaned forward.

Q. Then the door at that point was moving very slowly?

A. No, it had not started to move slowly. It was just at the point of being snubbed.

Q. And did you keep your head in that position so that the door came in contact with your neck or something like that?

A. Well, for a couple of seconds, I presume.

Q. And I assume if you kept your body the same way you stated, and the head the way you stated for a couple of seconds, you stopped the motion of the door, didn't you?

A. Yes." (Tr. 119-120.)

If plaintiff were injured in this manner, it would be an injury brought about by herself.

In *Brunet* v. *S. S. Kresge Co.*, 115 F. 2d 713, plaintiff was descending the stairs to defendant's basement. Plaintiff took hold of the banister to keep from falling. The stairs were muddy and slippery. Plaintiff slipped and fell down the stairs, suffering injuries. Reversing the judgment with directions to dismiss on the merits, this court said:

> "It is obvious in the case at bar that nothing was hidden from appellee, that she was well aware of the slippery and wet condition of the stairway as she started to descend it. She stated that she took hold of the banister as she started down because she realized that there was a possibility of falling."
>
> *Brunet* v. *S. S. Kresge Co.*, 115 F. 2d 713 at 715.

The above quoted decision is the Court's application of Illinois law. If this Court apply the same rule here it will deny the petition.

In *Olson* v. *Whitthorne and Swan*, 203 Cal. 206, 263 P. 518, plaintiff, having made some purchases in defendant's store was proceeding to pass through the right-hand door. She paused to hold the door open for a lady following be-

hind her. In doing so she stepped in the area of th
hand door and the rebound of the left-hand door he left-
plaintiff and injured her. Holding that plaintiff struck
not recover as a matter of law, the court said: could

"We think the court was justified in concludi
on the theory of defendant's responsibility in thng that
ter the plaintiff was so guilty of contributoryne mat-
gence. She testified that she was familiar with negli-
eration of these particular swinging doors, hathe op-
them many times prior to the accident, and kd used
their rebound. Notwithstanding this familiarinew of
knowledge, she placed herself in a position of ty and
for reasons which were entirely personal to hedanger
Olson v. *Whitthorne and Swan*, 263 P. 518 rself."
at 519.

The holding above quoted is applicable to the facts in this
case. The difference, however, here the proof sho ws that
plaintiff could not have been hit without substantia l effort
on her part.

In *Hill* v. *Alexander*, 321 Ill. App. 406, plaintiff, in defend-
ant's cocktail lounge, walked to a music box standi ng west
of the exit door to play a record. She put her hand l on the
jamb of the door. She testified a customer, intoxica ted, hit
the door and mashed one of her fingers. The court said:

"We find further that as a matter of law, plaintiff
was guilty of contributory negligence which was the
proximate cause of the injury. She testified hat she
observed Sol (the customer) leaving the rear end of
the bar and staggered up to the door, falling against
it, causing it to start to close, then straighte ning up
and again falling back against the door from t he side,
pushing it all the way shut. She not only pla ced her
finger in a dangerous place, but she permit ted her
finger to remain in a dangerous place when s he knew
Sol was approaching the door."
Hill v. *Alexander*, 321 Ill. App. 406 at 429.

In order to be struck by the door plaintiff Erns t had to
stand in the door inside the threshold. She had to confine

herself entirely within fifteen inches of the door jamb. She had to lean forward so that her head protruded more than eight inches beyond the position of the door when it was closed.

In *Murray* v. *Bedell Co.*, 256 Ill. App. 247, plaintiff fell in the vestibule of defendant's store. The slippery condition was apparent. The Appellate Court reversed the judgment without remanding.

In *Davis* v. *Williamsburg*, 266 Ky. 276, 98 S. W. 2d 881, the plaintiff was injured by collision with a door of a restaurant which opened on the sidewalk. Plaintiff admitted on cross-examination he was familiar with the door. The court held the plaintiff was guilty of contributory negligence as a matter of law.

In *Armstrong* v. *Warner Bros. Theatres, Inc.*, 161 Pa. Super. 385, 54 A. 2d 831, plaintiff sought to recover for injuries occasioned by collision with a swinging door in appellant's theatre. Holding that the plaintiff was guilty of contributory negligence, the court said:

> "She testified that she had attended the theatre a number of other times; yet on this occasion she neither looked, watched, waited nor stepped aside, and until she was struck did not know that the door was closing. Being a door, *ipso facto* it opened and closed. She did not place her hand on it to hold it open or to fend it off. In fact she did nothing to protect herself."
>
> *Armstrong* v. *Warner Bros. Theatres, Inc.*, 54 A. 2d 831 at 832.

If this ruling is applied to the facts in this case plaintiff here is guilty of contributory negligence as a matter of law.

V.

THE FINDING THAT JEWEL TEA COMPANY DID NOT ACT IN GOOD FAITH IN FAILING TO PRODUCE THE ALLEGED REPORT IS WITHOUT FOUNDATION.

A.

The Defendant Corporation Can Act Only Through Its Agents. Edward Vorbeck Had Charge of All Defendant's Records Relating to the Injury of Plaintiff. Albert M. Howard Had Charge of the Preparation and Trial of the Case From the Outset. The Finding of the Court That Edward Vorbeck and Albert M. Howard "Personally Exercised the Best of Faith" (Tr. 255-256) Is Equivalent to a Finding That the Defendant Corporation "Had Exercised the Best of Faith."

In *Billstrom* v. *The Triple Tread Tire Co.*, 220 Ill. App. 550, plaintiff sued Triple Tread Tire Company and Harry O. Whitney for damages suffered through misrepresentations. Whitney had acted for the corporation in the matter. The jury rendered a verdict of guilty against the corporation and not guilty as to Whitney. Reversing the judgment against the corporation, the court said:

> "Appellant is a corporation capable of acting only through agents, and where an action of fraud and deceit is brought against a corporation it can be held liable only on account of the rule of *respondeat superior,* by reason of the false representations of its agent. It follows therefore, as a matter of course, that if the agent who makes the representations and causes the injury is free from liability, his employer must also be free from liability."
>
> *Billstrom* v. *The Triple Tread Tire Co.*, 220 Ill. App. 550 at 553.

If the above holding be applied here, the finding of the trial judge that Edward Vorbeck "acted in the best of

faith" is a finding that the Jewel Tea Company "acted in the best of faith." All of the records pertaining to the accident of Mrs. Ernest were under the control of Edward Vorbeck. The corporation did not act in the premises except through Edward Vorbeck. The trial of the case was handled by Albert M. Howard. The finding that each of these men acted in the best of faith precludes any finding that the corporation did not likewise act in the best of faith.

In *Rogina* v. *Midwest Flying Service, Inc.*, 325 Ill. App. 588, the court held a verdict exonerating the agent exonerated the corporation.

In *Randall Dairy Co.* v. *Pevely Dairy Co.*, 274 Ill. App. 474, plaintiff sued dairy company and Hines for slander. The court directed a verdict as to Hines. Hines was the agent of the corporation. He was alleged to have uttered the slanderous words alleged in second count. The court said:

> "Since Hines was by the allegation of the second count the agent of the appellant dairy company and the court having directed a verdict for Hines as to the said count, it erred in not directing a verdict for the appellant dairy company as to the same count."
>
> *Randall Dairy Co.* v. *Pevely Dairy Co.*, 274 Ill. App. 474 at 484.

B.

The Finding of the Trial Judge That Jewel Tea Co. Did Not Exercise Good Faith in Not Producing an Alleged Report of Its Manager Is Erroneous as a Matter of Law. Edward Vorbeck Had Sole Charge of the Records as Agent of Defendant. He Testified He Had Made a Thorough Search for the Alleged Report. The Court Found His Testimony Was Given in "the Best of Faith." It Does Not Appear That the Alleged Report Contained Any Material Evidence. The Court Could Not Make a Finding of Bad Faith Against the Corporation Without Proof.

Mr. Bickel testified that he found no witnesses to the accident. (Tr. 69.) He testified that his conversation with the plaintiff was in regard to a doctor and taking her home. (Tr. 82.) There is no evidence that the alleged report would contain anything material. Bad faith must be proved by evidence clear and convincing. It cannot be by surmise, guess or suspicion.

If the circumstances can be reconciled with honesty, the court is required to draw that conclusion. Considerable authority is stated by the court in *McKennan* v. *Mickelberry,* 242 Ill. 117 at 134.

The court in its opinion in *Paley* v. *Dupont,* 71 F. 2d 856 at 859, quotes Judge Walter C. Lindley, then sitting in the District Court, that fraud will never be presumed but must be proved by clear and convincing evidence.

C.

Since the Alleged Report Was Not Admissible at the Instance of Defendant, Supposed Failure to Produce the Supposed Report Does Not Raise Any Presumption Against Defendant. This Is Especially True Since It Contained No Material Evidence.

In *Cartier* v. *Troy Lumber Co.*, 138 Ill. 533, the court instructed the jury that since the defendant had not produced his books and papers the jury could presume that the papers would be injurious to his case. Holding it was error to give the instruction, the court referred to the document saying:

> "We are unable to see how they could have been introduced on his behalf as primary proof without the consent of plaintiff. No presumption against him could therefore arise from his failure to produce them. Whatever inferences may be drawn against the party by reason of his failure to produce evidence in his possession or under his control are allowed on the theory that he willfully withholds such evidence. His conduct, says Greenleaf, is attributed to his supposed knowledge that the truth would have operated against his. (Sec. 37, *supra.*) He is treated in law as a 'spoliator of evidence.' (Lawson on Presumptive Evidence, 120, *et seq.*) He must therefore suffer, under the maxim '*omnia presumuntur contra spoliatorem.*'
>
> "It will not be seriously contended that a party is to be treated as a 'spoliator of evidence,' merely because he does not produce books and papers which he could only offer in evidence by consent of his adversary, or because some fact might be developed on the trial which would render them competent."
>
> *Cartier* v. *Troy Lumber Co.*, 138 Ill. 533 at 539.

In *Hanson* v. *Eustace*, 43 U. S. 653, the court instructed the jury that the defendant having failed to produce certain books they could draw inferences against him. Holding

that the giving of this instruction was reversible error, the court said:

> "The refusal to produce books, under a notice, lays the foundation for the introduction of secondary evidence. It affords neither presumptive nor prima facie evidence of the fact sought to be proved by them. A party cannot infer from the refusal to produce books which have been called for, that if produced they would establish the fact which he alleges they would prove. The party in such a case may give secondary evidence of the contents of such books or papers; and if such secondary evidence is vague, imperfect, and uncertain as to dates, sums, boundaries, etc., every intendment and presumption as to such particulars shall be against the party who might remove all doubt by producing the higher evidence."
>
> *Hanson* v. *Eustace,* 43 U. S. 653 at 708.

The authors of American Jurisprudence state the rule as follows:

> "The failure to produce books and papers which have been called for does not raise the inference that, if produced, they would establish the facts which it is alleged they would prove. The rule as to presumptions which may be indulged against a party to a suit for refusing to produce documents in his possession does not apply to such documents as he has no right to give in evidence without the consent of his adversary, and which he is not called upon to produce." 20 Am. Jur., § 184, p. 191.

CONCLUSION.

The court was not bound by the findings of the trial judge. There is no evidence of any negligence of the defendant corporation. There is no showing of any defect on defendant's premises. The evidence shows that plaintiff was not injured on defendant's premises but fell on the sidewalk. There is no showing of any notice to defendant of any supposed defect on its premises. If the court could assume, contrary to the fact, that plaintiff was injured by the door, then plaintiff's injury was the result of her own conduct. It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

ALBERT M. HOWARD,
ALVIN G. HUBBARD,
One North La Salle Street,
Chicago 2, Illinois,
Attorneys for Respondent,
Jewel Tea Co., Inc.